United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

OCTOBER TERM, 1906.

No. 1708. 447

No. 13, SPECIAL CALENDAR.

THE UNITED STATES ON THE RELATION OF SIGMUND REINACH, AGENT OF THE PUBLISHERS OF "WIENER CHIC," APPELLANT,

vs.

GEORGE B. CORTELYOU, POSTMASTER GENERAL OF THE UNITED STATES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED JULY 24, 1906.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 1, 1906.

In the Court of Appeals of the District of Columbia.

No. 1708.

THE UNITED STATES on the Relation of SIGMUND REINACH, &c., Appellant,

vs.

GEORGE B. CORTELYOU, Postmaster General of the United States.

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a Supreme Court of the District of Columbia.

At Law. No. 48449.

THE UNITED STATES on the Relation of SIGMUND REINACH, Agent of the Publishers of "Wiener Chic,"

vs.

GEORGE B. CORTELYOU, Postmaster General of the United States.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it Remembered, That in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to-wit:

1 *Petition for Writ of Mandamus.*

Filed April 2, 1906.

In the Supreme Court of the District of Columbia.

At Law. No. 48449.

THE UNITED STATES on the Relation of SIGMUND REINACH, Agent of the Publishers of "Wiener Chic,"

vs.

GEORGE B. CORTELYOU, Postmaster General of the United States.

To the Supreme Court of the District of Columbia:

The petition of Sigmund Reinach, agent as hereinafter set forth, shows as follows:

1. The relator, Sigmund Reinach, is a citizen of the United States and a resident of the State of New Jersey, to wit, at West Hoboken in said State. He is now and has been for about 12 years last past

the sole agent for the United States and Canada of the publishers of the foreign periodical known as Wiener Chic. His office as such agent is at the City of New York, where he receives from said publishers copies of said periodical in bulk and remails them there to subscribers therefor in the United States and Canada.

2. The publishers of said periodical are B. Kinkelstein & Brother, of Vienna, Austria. The said periodical is there, by said publishers, printed and published monthly and is issued on or about the first day of each and every month.

3. Said publication is issued from a known office of pub-
2 lication, that is to say, at the place of business of said publishers in said city of Vienna, as shown on the May, 1906, number thereof, a copy of which, marked "Relator's Exhibit No. 1," is filed herewith and made part of this petition. The character of said publication is well and truly represented by said Exhibit. Said publication is regularly issued at stated intervals as frequently as twelve times a year and one number thereof is in fact issued during each month in each year. Each number bears a date of issue and the numbers are consecutive. It is formed of printed paper sheets, without board, cloth, leather or other substantial binding, such as distinguish printed books for preservation from periodical publications. It is originated and published for the dissemination of information which is useful to the art and special industry of dressmaking and is devoted to said art and industry and has a legitimate list of subscribers throughout Europe and the United States and elsewhere. The publication thereof was commenced about 15 years ago and has thence continued without interruption until the present time. Its regular subscribers in the United States and Canada number about 1800. It is not designed primarily for advertising purposes, nor for free circulation, nor for circulation at nominal rates. Single copies are not for sale by the publishers or by their authority but said periodical is sold by the publishers and their agents to subscribers at the price of $14 per year. The text is in English, German and French and is descriptive of certain inventions in the art of dressmaking. It is accompanied by plates as shown in said Exhibit

No. 1, which said plates are germane to the text of the pub-
3 lication and illustrative of the text and contain matter added or supplemented to complete the text but not inserted in the text itself for want of space and for greater convenience and are issued with the publication as parts thereof. The said plates are in colors and serve to complete and are in fact necessary to complete and constitute an essential part of the descriptions of said several inventions. The publication in each number also contains matter which is not only descriptive of the costumes illustrated in the plates but also a very valuable fashion report in English and German giving the details of the new styles in Europe and the drift or tendency of styles in the great fashion centers. This report is necessary for dressmakers and other subscribers for the publication. It is a foreign periodical of the same general character as those admitted as second class mail matter in the United States. The publication does not violate any copyright granted by the United States. The foregoing

description of said publication well and truly describes and is applicable to each and every number of said publication, which has been heretofore issued and which the said publishers intend to issue.

4. Heretofore, to wit, on the 21st day of September 1898, upon the application of the relator, as agent as aforesaid, the said publication was admitted by and under the direction of the then Postmaster General of the United States as second class mail matter to be transmitted through the mails at the same rate, to wit, second class rate, as if published in the United States, and from that time until August 16, 1905, the said publication continued to be
4 so admitted and transmitted through the mails at the second class rate without interruption or objection from any source.

5. On or about August 16, 1905, the respondent herein caused to be sent to the relator, through the Acting Third Assistant Postmaster General, a notice in writing requiring the relator to show cause on September 14, 1905, why the admission of said publication as second class mail matter in the United States mails should not be revoked and why the third class rate of postage should not be charged thereon; to which notice the relator duly responded. Thereafter, to wit, on November 28, 1905, the respondent directed the Postmaster at the City of New York to annul the previous authorization aforesaid for mailing said publication at the second class rate of postage and alleged as the ground for such annulment that said publication "is not a newspaper or other periodical of the same general character as those admitted to the domestic mails at the second class rate of postage;" by reason of which action by the respondent the said publication has been and continues to be excluded from the United States mails as second class matter and the relator is required to pay postage thereon as third class mail matter. The postage on one copy of each number at second class rate is one cent and at third class rate eight cents.

6. All the provisions, conditions and requirements contained in the laws of the United States relating to mailable matter of the second class have been complied with by the publishers of said periodical and by the relator as agent of said publishers, and
5 every issue and number thereof has been mailable matter of the second class, as such matter is described and defined by the United States laws. Since the admission of said periodical in September, 1898, to the United States mails as second class matter as aforesaid no change has been made therein nor in the manner or condition of its publication that destroys or in any way affects its characteristics as mailable matter of the second class, and it is now asserted or claimed by the respondent that said publication is to be refused admission to the mails of the United States as second class matter because of any specific requirement, definition or test contained in the laws of the United States relating to mailable matter of the second class.

Your petitioner therefore prays that the writ of mandamus may issue to said George B. Cortelyou, Postmaster General of the United States, commanding him to enter and admit the aforesaid periodical known as Wiener Chic to the United States mails as mailable mattter

of the second class to be transmitted at the rate prescribed by law for mailable matter of the second class, and that a rule on said George B. Cortelyou, Postmaster General as aforesaid, may be granted to show cause why said writ should not be issued for the purposes aforesaid.

SIGMUND REINACH.

LORENZO A. BAILEY,
IVAN HEIDEMAN,
Att'ys for Pet'n'r.

6 STATE OF NEW YORK, *County of New York, ss:*

I, Sigmund Reinach, do solemnly swear that I have read the foregoing petition by me subscribed and know the contents thereof and that the facts therein stated upon my personal knowledge are true and those stated upon information and belief I believe to be true.

SIGMUND REINACH.

Subscribed and sworn to before me this 30th day of March, 1906.

[NOTARIAL SEAL.] HENRY H. ROBESON,
Notary Public in and for said State and County.

* * * * * * *

8 *Answer of Defendant, George B. Cortelyou.*

Filed April 20, 1906.

In the Supreme Court of the District of Columbia.

At Law. No. 48449.

THE UNITED STATES on the Relation of SIGMUND REINACH, Agent of the Publishers of "Wiener Chic,"

vs.

GEORGE B. CORTELYOU, Postmaster General of the United States.

Answer of the Defendant, George B. Cortelyou, Postmaster General, to the Petition of the Above Named Relator and to the Rule to Show Cause why a Writ of Mandamus Should not Issue Thereon.

In answer to the said petition, and as cause against the said rule, the defendant George B. Cortelyou, Postmaster General, respectfully shows as follows:

1. The defendant admits, upon information and belief, the allegations of the citizenship and residence of the petitioner. He says, however, that the publication "Wiener Chic" is not a periodical publication or a foreign periodical, and he is unable to admit that the petitioner has been for twelve years last past the sole agent in the United States and Canada of the publishers of such publication. On the contrary he says that on September 21, 1898, the said publication was admitted as second-class matter to be transmitted through the mails on the application of one B. Reinach, alleging himself to be the agent of the foreign publishers. He is informed, however, that the

petitioner is now the agent of the said publishers in the City of New York, and that he receives copies thereof in bulk for distribution to persons in the United States and Canada.

2. He admits, upon information and belief, that B. Finkel-
9 stein & Brother of Vienna, Austria, are the publishers of such publication. He is not informed as to the remaining allegations of said paragraph save by the petition itself and the allegations contained in a certain bill of equity brought against this defendant in the Supreme Court of the District of Columbia, Equity No. 26,019, wherein it is stated that "the matter printed in each number is collected sometime in advance and printed, issued and published several weeks before the stated date of publication, for example, the number for February, 1906, was printed and issued at Vienna during the month of November, 1905, and the copies of said number required for subscribers in the United States were sent in bulk from Vienna to the complainant who received and mailed them to said subscribers during the early part of December, 1905, to wit, sometime during the first ten days in December, 1905."

3. The defendant admits that said publication purports to be issued from the place of business of said publishers in the City of Vienna, Austria, but he is unable to say whether the said place of business is a known office of publication, or that said publication is issued therefrom, for the reason that such facts are not shown in the records of the Post Office Department by the application for entry or otherwise, said application being made by B. Reinach as the American agent for the foreign publishers. Defendant admits that the said publication is regularly issued at stated intervals as frequently as twelve times a year and purports to be a monthly, but he is informed and believes, and so avers, that such numbers are not issued during the month to which they relate but long prior thereto.

He admits that each number bears a date of issue and that
10 the numbers are consecutive. He denies, however, that said publication is formed of printed paper sheets within the meaning of the Act of March 3, 1879. He alleges that the same is formed as hereinafter more fully set forth. He admits that it is without board, cloth or other substantial binding; that it is originated and published for the dissemination of information which is useful in dress making, and that said publication is intended for use in the industry of dress making; that the said publication has a legitimate list of subscribers in the United States and so far as he is informed is not designed for free circulation or for circulation at nominal rates. This defendant can neither admit nor deny that the regular subscribers in the United States and Canada number about eighteen hundred (1,800), but for aught he knows to the contrary the same may be true. He admits that the subscription price of the said publication purports to be Fourteen Dollars ($14.00) a year, but for aught this defendant knows to the contrary single copies are not for sale by the publishers or by their authority.

But he submits that all said facts are immaterial and irrelevant for the reason that said publication is not a newspaper or periodical publication, and unless it be first determined to be such newspaper or

periodical publication, its compliance with the certain enumerated characteristics aforesaid is of no consequence in determining its right to admission as second-class matter.

Defendant admits that the text is in English, German and French but he denies that the same is descriptive of certain inventions in the art of dress making. On the contrary he says that the said text

11 is descriptive of certain designs or patterns for women's dresses, which patterns or designs are for sale by the publishers of said publication. He denies that the said publication is accompanied by plates, or that the said plates are germane to the text and illustrative of the text, or that they contain matter added to supplement or complete the text and not inserted in the text itself for want of space, time or greater convenience. He further denies that said plates serve to complete, or are in fact necessary to complete an essential part of the descriptions of any inventions whatsoever. He further denies each and every remaining allegation contained in said third paragraph, and denies that the description therein well and truly describes the numbers of said publication or any of them which has heretofore been issued.

On the contrary this defendant avers and charges the truth to be that said publication known as "Wiener Chic" consists and is made up of a cover bearing the title, number, date and other marks and signs thereof in which are enclosed an indefinite number of colored fashion plates designed and intended for separate use; that such fashion plates constitute in effect designs and instruments of trade for use by persons engaged in the business of dress making; that there is no true text in said publication of which said plates are illustrative, or to which they are germane; but that so much text as is found on the loose pages, and the back, and inside of the cover thereof, are mere descriptions or designations of the plates aforesaid, which constitute the substantial contents of said publication. This defendant denies that said publication is accompanied by plates, or

12 that said plates are germane to the text of the publication, and illustrative of the text, or that they contain matter added to the said text to complete the same. On the contrary he avers that the said text is purely incidental and subsidiary to the said plates, and that the said publication in substance and fact contains no text.

This defendant denies that said plates accompany each number as supplementary matter. On the contrary he avers that the said plates are in no sense supplemental to the regular issues of such publication, but in fact constitute such issue themselves; that they are not matter supplied in order to complete that to which they are added or supplemented, nor are they matter omitted from the regular issue for want of space, time, or greater convenience. He also avers that the said plates are independent and complete in themselves, and that the description or designation thereof in the supposed text of the said publication is merely colorable.

He further avers that the so-called fashion report printed on the inside of the cover of the said publication is relatively insignificant and forms no substantial part of the said publication, the main sub-

stantial contents of which, as heretofore stated, consists of the fashion plates aforesaid, which are matter of the third class. He likewise avers that each number of the said publication contains along with the said loose plates, a loose dress pattern intended for use in the actual cutting of garments, and that the said pattern is matter of the fourth class. And that even if there were a text to the said publication, entitling it to admission as second-class matter, which he denies, the said pattern, enclosed as aforesaid, would render the said publi-
cation chargeable with postage as the fourth-class rate.

13 This defendant denies that the said publication is a foreign newspaper or other periodical of the same general character as those admitted to the second class in the United States. On the contrary he avers that the said publication is not, in fact, a newspaper or other periodical publication at all.

The allegation that such publication is not designed primarily for advertising purposes, this defendant, answering in respect of his official knowledge of the acts and adjudications of the Post Office Department, can neither admit nor deny, for the reason that the same was not adjudicated in the hearing in the Post Office Department and was not necessary to be adjudicated because the determination that the publication was not a newspaper or other periodical of the same general character as those admitted in the United States rendered an inquiry into any additional questions superfluous. He avers, that further investigation tends to show that said publication is designed primarily for advertising purposes, in that it is designed to advertise the other business of the publisher, to wit, the manufacture and sale of dress patterns for use in making women's dresses and that the main purpose of such publication is to induce dress makers to order patterns therein described. And this defendant says that the allegation made in said petition for the purpose of obtaining a writ of mandamus against this defendant puts in issue the said question whether the publication is designed primarily for advertising purposes; and he is advised and submits that no, writ of mandamus may lawfully issue to command this defendant to transport through the mails copies of the said publication at the
second class rates unless and until it is determined that said

14 publication complies in all respects to the requirements imposed by the statutes of the United States as a condition precedent to such transmission, one of which is that the publication shall not be designed primarily for advertising purposes.

4. The defendant says that heretofore, to wit, on the twenty-first day of September, 1898, upon the application of one B. Reinach, alleging himself to be the agent of the foreign publishers, said publication was admitted by and under the direction of the then Postmaster General of the United States as second-class matter to be transmitted through the mails at the second-class rate as if published in the United States, and that said publication continued to be so admitted and transmitted from that time without objection until sometime in the year 1905.

This defendant submits, however, that the allegations of said paragraph are irrelevant and immaterial and matters as to which

this defendant is not required to make answer, for the reason that the admission and transmission of mailable matter at the rates and under the terms prescribed by the statutes of the United States is a continuing administrative act and duty, the performance of which is devolved by law upon the Postmaster General for the time being, and that the defendant as such Postmaster General for the time being, in the performance of this duty, is nowise bound or controlled by the action of his predecessor or prior action of the Post Office Department, nor does the admission and transmission by one Postmaster General of copies of the publication issued by the complainant at the second-class or any other particular rate constitute any
15 obligation, contractual or otherwise, upon the United States or its officers thereafter to admit other copies of the said publication for transmission at such rate. He further avers that the only effect in contemplation of law of the revocation of the certificate of entry heretofore given for the transmission of such publication is to charge upon such copies of the petitioner's publication as may be hereafter offered for transmission in the mails the lawful rate of postage to which such copies are subject.

5. Answering paragraph 5 the defendant on August 16, 1905, acting through the Third Assistant Postmaster General in that behalf caused to be issued to the relator as the apparent agent of said publication a rule to show cause on Thursday, September 14, 1905, at two o'clock P. M., why the authorization for the admission of the publication "Wiener Chic" to the second class should not be revoked, and why the third-class rate of postage should not be charged for the transmission of that publication in the mails upon the ground that the publication is not a newspaper or other periodical of the same general character as those admitted to the second-class in the United States. A Copy of said rule to show cause is hereto appended marked exhibit "A."

On September 11, 1905, the complainant wrote to the Third Assistant Postmaster General asking for a copy of the law referred to in the rule to show cause. In response to the publishers' request, the time for answering said rule was extended to October 31, 1905. On October 28, 1905, Lorenzo A. Bailey and Ivan Heideman, counsellors at law, appeared before the Third Assistant Postmaster General as attorneys for the publishers and submitted an oral statement and argument on behalf of the publishers, supplementing the
16 same with an inquiry whether there would be any further objection to the admission of the publication if the pages were stitched or otherwise fastened together, and requesting a further extension for a period sufficient to enable them to communicate with the publishers at Vienna, Austria, if necessary. On November 10, 1905, the attorneys aforesaid were notified that the decision would be withheld for a reasonable time to permit them to present any further statement they might care to make. Accordingly, on November 15, 1905, the said attorneys submitted a written argument on behalf of the publishers, requesting, if there still be objection on the part of the Department, that the same be pointed out to them and that they be given a reasonable time for further reply. On November

18, 1905, the Third Assistant Postmaster General answered stating that any further statements would be given full consideration if presented prior to December 1, 1905. On November 21, 1905, the said attorneys presented to the Third Assistant Postmaster General a written argument on behalf of the publishers and submitted the matter for decision.

Accordingly, on November 28, 1905, the Third Assistant Postmaster General, acting for this defendant in that behalf, notified said attorneys that after careful consideration of all the evidence submitted it had been decided that "Wiener Chic" is not a newspaper or other periodical of the same general character as those admitted to the second class in the United States, and, therefore, is not admissible to the domestic mails at the second-class rates of postage. A copy of said letter is hereto attached marked exhibit "B." On the same date the postmaster at New York, N. Y., was formerly notified of said decision and directed to inform the agent of the publishers thereof.

17 The letter dated December 2, 1905, addressed to the petitioner, a copy whereof marked exhibit No. 2 is filed with the bill of complaint, was sent by said postmaster in pursuance of such direction. Thereafter, on December 5, 1905, L. A. Bailey and Ivan Heideman, attorneys as aforesaid, informed the Third Assistant Postmaster General in writing that the January issue of "Wierner Chic" was already in the hands of the agent for mailing, and that the February issue was on its way to him from Europe and asked, therefore, that the order of exclusion be suspended until the mailing of these two issues might be completed. On December 8, 1905, the said attorneys addressed the Third Assistant Postmaster General in writing requesting that the March number might be included in the order of suspension. In compliance with such request, the Third Assistant Postmaster General did, on December 12, 1905, notify the postmaster at New York, New York, that under the circumstances of the case it would be deemed proper to authorize him to accept the February and March issues of said publication for mailing at the second-class rates of postage if presented within a reasonable time, and of such direction the said attorneys were duly notified. On December 29, 1905, after further correspondence, the postmaster at New York, N. Y. was directed, in response to a further request, at the discretion of the agent, to accept copies of the March issue for mailing at the second-class rates of postage for one month after they are received by the agent from Europe.

This defendant further says that, having permitted the petitioner to mail in accordance with the original ruling of November
18 28, 1905, copies of all of the issues of said publication then in print, it was and is his intention to enforce said decision and refuse to transmit said publication at the second-class rates of postage.

This defendant says that, acting through the Third Assistant Postmaster General in that behalf, after a full, fair and impartial hearing he has in his capacity of Postmaster General of the United States, and in the exercise of the power and discretion lodged in him

as such, held and determined that said publication does not possess the characteristics of second-class matter under the laws governing the classification of mail matter, and that the said publication is not as required by section 15 of the Act of March 3, 1879, "a newspaper or other periodical of the same general character as those admitted to the second class in the United States." And he further says that by reason of the facts hereinbefore set out, as well as those which appear by inspection of the copies of the said publication, the same is not in fact a newspaper or other periodical of the same general character as those admitted to the second class in the United States.

6. The defendant denies that all the provisions, conditions and requirements contained in the laws of the United States relating to mailable matter of the second class have been complied with by the publishers of said publication or by the relator as agent of said publishers, or that every issue and number thereof is mailable matter of the second class as such matter is described and defined by the laws of the United States. On the contrary he avers that as herein-
19 before more fully set forth the said publication has not at any time complied with the primary requirements of said laws, namely, that the publication shall be a newspaper or other periodical publication. For the reason that admission of mail matter and the classification thereof is a continuing administrative duty, as hereinbefore more fully set out, the defendant says that it is immaterial whether any change has been made in the said periodical since its admission in September, 1898. He denies the remaining allegations of the sixth paragraph and asserts on the contrary that the said publication was refused admission as matter of the second class for the reason that the said publication is not, as required by law, a newspaper or other periodical publication.

7. The defendant, George B. Cortelyou, Postmaster General, says that as Postmaster General of the United States he is charged by law with the duty of superintending generally the business of the Post Office Department and of executing all laws relative to the postal service; that among such duties is that of classifying the mail matter offered for transmission through the United States mails and distributing the same into the respective classes created and designated by Congress, in the course of which classification it becomes incumbent upon him, acting through his lawful subordinate, the Third Assistant Postmaster General in that behalf, to investigate and ascertain whether matter offered for transmission as second-class matter does or does not comply with the conditions upon which the law permits publications to be transmitted and whether such matter is in fact second-class matter or matter of some other class; that such investigation and determination exercised by the Postmaster Gen-
eral for the time being as the head of an executive depart-
20 ment in the ordinary discharge of his duties requires an inquiry into facts, an examination of evidence and an application of the law to the facts; that in the case of the publication "Wiener Chic," after an inquiry into the facts relevant and material, an examination of evidence and an interpretation of the law and application thereof to the facts, he, acting through the Third — Post-

master General, in that behalf, upon a full, fair and impartial hearing, accorded upon due notice to the petitioner, found and determined that said publication had not the statutory characteristics of second-class mail matter by reason of the fact that the same was not a newspaper or other periodical. Wherefore, acting through the Third Assistant Postmaster General, in that behalf, he held and determined and decided that said publication "Wiener Chic" was not entitled to admission to the mails as second-class matter, and that the certificate permitting such admission should, for that reason, be revoked and become inoperative in the future, and that he, as said Postmaster General, must, in the performance of his said duty, charge upon the said publication the third-lass rate of postage; which said finding, determination and decision involved the exercise of judgment and discretion on the part of the Postmaster-General and of the Third Assistant Postmaster General acting in that behalf, and for that reason, as this defendant respectfully submits are not subject to be reviewed by this honorable court.

And the defendant says that the petitioner in and by his said petition has not made or stated such a case as would entitle him to the writ of mandamus prayed, and that whether the said publication of the petitioner is mailable matter of the second class, as prayed in said petition to be determined, is a matter wholly within the
21 competence and jurisdiction of the Postmaster General, the determination of which is committed exclusively to his judgment and discretion; and that by reason of the determination and decision aforesaid, based on the facts aforesaid, it became and was and is unlawful for the defendant to transmit the said publication at the second-class rate of postage as in the said petition is prayed to be commanded.

GEO. B. CORTELYOU,
Postmaster General.

HENRY H. GLASSIE,
Attorney for the Defendant.

DISTRICT OF COLUMBIA, *ss:*

George B. Cortelyou, being first duly sworn, deposes and says that he has read the foregoing answer by him subscribed and knows the contents thereof, and the same are true, save those matters stated upon information and belief, which he believes to be true.

GEO. B. CORTELYOU,
Postmaster General.

Subscribed and sworn to before me this 18th day of April, 1906.

GEORGE G. THOMSON,
Notary Public.

[NOTARIAL SEAL.]

My Commission expires March 14, 1911.

22 Filed April 20, 1906.

Copy.

POST OFFICE DEPARTMENT,
THIRD ASSISTANT POSTMASTER GENERAL,
WASHINGTON, *August* 16, 1905.

C. D. 92125.

Mr. S. Reinach, Agent of the Publisher of "Weiner Chic," 10 and 12 W. 22nd St., New York, N. Y.

SIR: You are hereby notified that, in accordance with the Act of Congress approved March 3, 1901 (ch. 851, 31 Stats. at L., 1107), you will be granted a hearing at the office of the Third Assistant Postmaster General, Washington, D. C., at 2 P. M. on Thursday, September 14, 1905, to show cause why the authorization for admission of the foreign publication "Weiner Chic," to the second class of mail matter in the mails of the United States, under the Act of March 3, 1879, should not be revoked, and why the third-class rate of postage should not be charged for the transmission of that publication in the mails upon the following ground:

The publication, judged by the copies submitted is not a newspaper or other periodical of the same general character as those admitted to the second class in the United States. (See Act of March 3, 1879, ch. 180, sections 10, 14 and 15, 1 supp., page 246—sections 427, 428 and 431 of the Postal Laws and Regulations.)

Your answer, in writing, must be submitted on or before September 14, 1905.

23 Should you desire to avoid the expense and trouble incident to a trip to Washington, your written answer will be given the same full and painstaking consideration as though you appeared in person or by representative.

Respectfully,

(Signed) A. M. TRAVERS,
Acting Third Assistant Postmaster General.

PF—fi.
(Registered.)

24 Filed April 20, 1906.

Copy.

POST OFFICE DEPARTMENT,
THIRD ASSISTANT POSTMASTER GENERAL,
WASHINGTON, *November* 28, 1905.

C. D. 92125.

Postmaster, New York, N. Y.

SIR: Upon consideration of the rule to show cause and after hearings accorded the agent of the publisher on and since September 14,

1905, it is hereby determined and you will so inform the agent of the publisher, that "Wiener Chic," a foreign publication is not entitled to transmission in the domestic mails at the second-class rates of postage, because it appears from evidence submitted that it is not a newspaper or other periodical of the same general character as those admitted to the second class in the United States. (See Act of March 3, 1879, ch. 180, sections 10, 14 and 15, 1 supp., page 246—sections 427, 428 and 431, P. L. and R.)

Therefore, the authorization heretofore issued for acceptance of "Wiener Chic," for mailing at the second-class rates of postage is hereby revoked, and you are directed to enter that fact upon the records of your post office.

You will require postage at the third-class rate—one cent for each two ounces or fraction thereof—to be prepaid by stamps affixed to each separately addressed copy or package of unaddressed copies of the publication hereafter mailed at your office.

25 If, after you have notified the agent of the publisher of the action of the Department in annul-ing the authorization for mailing "Wiener Chic" at the second-class rates of postage, you learn that the copies of an issue thereof have been printed and sent to the agent for mailing, you are directed to ascertain the exact facts and report the same to this office. If the circumstances warrant it you will be authorized to suspend the enforcement of the order of exclusion until the mailings of the issue have been completed, for which a reasonable time will be allowed.

Respectfully,

(Signed) EDWIN C. MADDEN,
Third Assistant Postmaster General.

PF—fi.

26 *Joinder in Issue.*

Filed April 27, 1906.

In the Supreme Court of the District of Columbia.

At Law. No. 48449.

THE UNITED STATES on the Relation of SIGMUND REINACH, Agent of the Publishers of "Wiener Chic,"
vs.
GEORGE B. CORTELYOU, Postmaster General of the United States.

The petitioner joins issue upon so much of the respondent's answer as denies the following averments, respectively, contained in the petition herein filed, that is to say:

1. That the said publication, Wiener Chic, is a periodical publication:
2. That the said publication is a foreign periodical:
3. That the admission of said publication, on September 21, 1898,

as second class matter, was upon the application of the relator, Sigmund Reinach, as agent of the publishers of said publication:

4. That said publication is formed of printed paper sheets:

5. That the text of said publication is descriptive of certain inventions in the art of dressmaking:

6. That the said publication is accompanied by plates:

7. That the said plates are germane to and illustrative of the said text and that they contain matter added to supplement or
27 complete the text but not inserted in the text itself for want of space and for greater convenience:

8. That the said plates serve to complete and are in fact necessary to complete, and constitute an essential part of, the descriptions of said inventions:

9. That the description of said publication contained in the 3rd paragraph of the petition well and truly describes the numbers of said publication which have heretofore been issued:

10. That all the provisions, conditions and requirements contained in the laws of the United States relating to mailable matter of the second class have been complied with by the publishers of said publication and by the relator as agent of the said publishers:

11. That each and every issue and number of said publication is and has been mailable matter of the second class as such matter is described and defined by the laws of the United States.

The petitioner also joins issue upon so much of the respondent's said answer as alleges—

1. That the colored fashion plates therein mentioned are designed and intended for separate use:

2. That there is no true text in said publication of which said plates are illustrative or to which they are germane:

3. That the said plates constitute the substantial contents of said publication:

4. That the text found on the loose pages and on the back and inside of the cover of said publication are mere descriptions or designations of said plates:

28 5. That the text found in said publication is purely incidental and subsidiary to the said plates:

6. That the said publication is designed primarily for advertising purposes:

7. That the said publication in substance and fact contains no text:

8. That the said plates are independent and complete in themselves:

9. That the description or designation of said plates in said text is merely colorable:

10. That the said plates are matter of the third class:

11. That each number of the said publication contains along with the said plates a loose dress pattern intended for use in the actual cutting of garments and constituting matter of the fourth class:

12. That the main purpose of such publication is to induce dressmakers to order patterns therein described:

13. That the said publication is not "a newspaper or other periodical of the same general character as those admitted to the second class in the United States:

14. That as to the question whether or not the said publication is mailable matter of the second class, the determination thereof is committed exclusively to the judgment and discretion of the respondent and is not subject to review by this court:

15. That it became and was and is unlawful for the respondent to transmit the said publication at the second class rate of postage as in the said petition prayed to be commanded.

29 The petitioner also joins issue upon each and every denial in said answer of the averments in said petition other than those hereinbefore specified.

LORENZO A. BAILEY,
IVAN HEIDEMAN,
Attorneys for Petitioner.

Stipulation.

Filed May 29, 1906.

In the Supreme Court of the District of Columbia.

At Law. No. 48449.

THE UNITED STATES *ex Rel.* SIGMUND REINACH
vs.
GEORGE B. CORTELYOU, Postmaster General of the United States.

The parties hereto, by their attorneys, respectively, stipulate and agree, for the purposes of this suit only, as follows:

1. The publication herein filed, marked "Relator's Exhibit No. 1," is a true copy of the May, 1906, number of the publication known as Wiener Chic mentioned in this suit as sought to be mailed as second class matter.

2. The said May, 1906, number substantially represents the issues of said publication as they have commonly been offered for mailing as second class matter prior to the ruling of the Postmaster General complained of in the petition.

30 3. In any hearing of this cause whether in this Court or on appeal the original exhibits or duplicates thereof as well as any issues of the publication may be referred to and considered as part of the record and of this stipulation and the printing thereof may be dispensed with.

4. B. Reinach, mentioned in paragraph 1 of the answer herein filed, has departed this life. He was the father of the relator and was duly authorized to act for the relator as agent for said publication during the absence of the relator from the United States from time to time.

5. Since the August, 1905, number, the loose dress pattern mentioned in paragraph 3 of respondent's answer herein has been sent

by the relator to the subscribers of said publication, who subscribe therefor to him as agent, separately as fourth class mail matter and not under the same cover with the other parts of the publication, although in the said publication such pattern is advertised as included in the subscription contract.

6. The publishers of said publication and the relator as their agent sell and furnish upon request dress patterns intended for use in the actual cutting and making of the garments described and illustrated in the publication.

7. This case is submitted upon the petition and answer with the additional facts contained in this stipulation and all facts appearing upon inspection of the exhibits herein referred to.

LORENZO A. BAILEY,
IVAN HEIDEMAN,
Attorneys for Relator.
HENRY H. GLASSIE,
Attorney for Respondent.

31 *Order Dismissing Petition, &c.*

In the Supreme Court of the District of Columbia.

No. 48449. At Law.

THE UNITED STATES *ex Rel.* SIGMUND REINACH
vs.
GEORGE B. CORTELYOU, Postmaster General of the United States.

This cause coming on to be heard upon the petition, answer exhibits and stipulation herein filed, It is by the Court considered, adjudged and ordered that the prayers of said petition be and the same are hereby denied and that the said petition be and the same is hereby dismissed with costs, to be taxed by the Clerk, and that the respondent have execution therefor.

From the foregoing judgment the petitioner by his attorneys notes an appeal to the Court of Appeals of the District of Columbia and the amount of the bond for costs upon such appeal is hereby fixed at $100 or the petitioner may deposit $50 with the Clerk of this Court in lieu of such bond.

THOS. H. ANDERSON, *Justice.*

Memorandum.

June 15, 1906—Appeal bond filed.

32 *Order for Transcript on Appeal.*

Filed July 11, 1906.

In the Supreme Court of the District of Columbia.

At Law. No. 48449.

U. S. *ex Rel.* SIGMUND REINACH
v.
GEO. B. CORTELYOU, Postmaster General of the United States.

The Clerk will please prepare the transcript of record in this suit on appeal to the Court of Appeals, including therein the following:

1. Petition and Relator's Exhibit No. 1.
2. Answer and two letters thereto attached.
3. Joinder in issue.
4. Stipulation.
5. Order dismissing petition, &c.
6. Memo. showing filing of appeal bond.
7. This order.

LORENZO A. BAILEY,
IVAN HEIDEMAN,
Attorneys for Petitioner.

33 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 32, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 48449 At Law, wherein The United States, on the relation of Sigmund Reinach, agent of the publishers of "Wiener Chic" is Plaintiff, and George B. Cortelyou, Postmaster General of the United States, is Defendant, as the same remains upon the files and of record in said Court.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court, at the city of Washington, in said District, this 19″ day of July, A. D., 1906.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

34 In the Court of Appeals of the District of Columbia.

No. 1708.

UNITED STATES *ex Rel.* SIGMUND REINACH, Agent of the Publishers of Wiener Chic, Appellant,

vs.

GEORGE B. CORTELYOU, Postmaster General of the United States, Appellee.

The clerk will please dispense with the printing of the Relator's Exhibit No. 1. This is pursuant to a stipulation of counsel found in the record.

LORENZO A. BAILEY,
IVAN HEIDEMAN,
Attorneys for Appellant.
HENRY M. GLASSIE,
Attorney for Appellee.

(Endorsed:) No. 1708. U. S. *ex rel.* Sigmund Reinach, etc., Appellant, *vs.* George B. Cortelyou, etc., Appellee. Stipulation to dispense with printing certain portion of record. Court of Appeals, District of Columbia. Filed Jul. 30, 1906. Henry W. Hodges, Clerk.

Endorsed on cover: District of Columbia supreme court. No. 1708. The United States on the relation of Sigmund Reinach, &c., appellant, *vs.* George B. Cortelyou, Postmaster General of the United States. Court of Appeals, District of Columbia. Filed Jul- 24, 1906. Henry W. Hodges, clerk.

No. 1708.

In the Court of Appeals of the District of Columbia.

OCTOBER TERM, 1906.

THE UNITED STATES EX REL. SIGMUND RENIAL, AGENT OF THE PUBLISHERS OF WIENER CHIC, APPELLANT;

v.

GEORGE B. CORTELYOU, POSTMASTER-GENERAL.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEE.

HENRY H. GLASSIE,
Special Assistant to the Attorney-General.

In the Court of Appeals of the District of Columbia.

OCTOBER TERM, 1906.

THE UNITED STATES, EX REL., SIGMUND Reinach, agent of the publishers of "Wiener Chic," appellant,
v.
GEORGE B. CORTELYOU, POSTMASTER-General of the United States.

No. 1708.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

This case is a petition for a writ of mandamus to compel the Postmaster-General to transport copies of a publication called "Wiener Chic" at the second-class rates of postage, instead of the third-class rate, to which that official had determined them to be subject.

"Wiener Chic," as the name implies, is a publication printed in Vienna, Austria. On September 21, 1898, upon the application of one Reinach, agent at New York, it was admitted to the second class as a foreign periodical under the provisions of section 15, act March 3, 1879 (printed in the Appendix), permitting the transmission at second-

class rates of foreign newspapers and other periodicals of the same general character as those admitted to the second class in the United States.

Upon a rule to show cause duly issued and after a full and fair hearing accorded the publisher and his counsel (Rec., 8–9), the Postmaster-General found and determined that "Wiener Chic" was not a newspaper or periodical of the same general character as those admitted in the United States, and held it subject to the third-class rate. (Rec., 9–10.)

The petitioner, having first brought a bill in equity which upon denial of an interlocutory injunction he dismist, filed this petition for a mandamus.

Answer was duly put in by the Postmaster-General. Upon this answer issue was joined and the cause submitted and heard upon petition, answer, exhibits, and stipulation without evidence or proofs. The facts, then, as stated in the answer must be taken as true, except in so far as they are supplemented by "the additional facts contained in this stipulation and all facts appearing upon the exhibits herein referred to." (Rec., 16.) The facts stated in the petition therefore, except those that may have been admitted by the answer, are immaterial.

ARGUMENT.

The true question in this case is, Whether the finding and determination of the Postmaster-General was so beyond his power to make that the

court may collaterally treat it as a nullity, and command him to carry the relators' publication notwithstanding.

For there is no power generally to review the findings of the Postmaster-General or to correct his errors. His act must be beyond the scope of his authority or else it stands as an absolute finality. (*Riverside Oil Co.* v. *Hitchcock*, 190 U. S., 316, 324; *New Orleans* v. *Paine*, 147 U. S., 261, 264; *Noble* v. *Union River Logging Co.*, 147 U. S., 165, 176, 177.)

I.

What the Postmaster-General did.

In order to see, then, what his decision really was, and whether he had power to make it, let us examine the facts.

The relator claims that "Wiener Chic" is a newspaper or other periodical publication. The Postmaster-General denies that it is a newspaper or other periodical publication; that it may have the external marks and signs of a periodical—name, printed paper sheets without substantial binding, regularity of issue, consecutive numbering—is admitted, but both this court and the Supreme Court of the United States have decided that these do not make it a periodical. (*Payne* v. *Houghton*, 22 App. D. C., 234, 248; *Houghton* v. *Payne*, 194 U. S., 88, 96.)

Let us see what the publication really is. In the first place it is not only printed, but "issued

and published" weeks in advance of the supposed dates of issue in the United States. "For example, the number for February, 1906, was printed and issued at Vienna during the month of November, 1905." (Rec., 5.)

As to the facts about the publication itself the answer of the Postmaster-General is explicit:

> On the contrary this defendant avers and charges the truth to be that said publication known as "Wiener Chic" consists and is made up of a cover bearing the title, number, date, and other marks and signs thereof in which are inclosed an indefinite number of colored fashion plates designed and intended for separate use; that such fashion plates constitute in effect designs and instruments of trade for use by persons engaged in the business of dressmaking; that there is no true text in said publication of which said plates are illustrative, or to which they are germane; but that so much text if found on the loose pages, and the back and inside of the cover thereof, are mere descriptions or designations of the plates aforesaid, which constitute the substantial contents of said publication. This defendant denies that said publication is accompanied by plates or that said plates are germane to the text of the publication and illustrative of the text, or that they contain matter added to the said text to complete the same. On the contrary he avers that the said text is purely incidental and subsidiary to the said plates,

> and that the said publication in substance and fact contains no text.
>
> This defendant denies that said plates accompany each number as supplementary matter. On the contrary he avers that the said plates are in no sense supplemental to the regular issues of such publication, but, in fact, constitute such issue themselves. (Rec., 6.)

These are the facts which the Postmaster-General, in the exercise of his duty to pass upon the many thousand publications offered for second-class rate, and after a study of this particular publication, has found and determined. Somebody must determine them. With all respect, it may be asked whether there is anything in the nature of things which enables this high judicial tribunal to do over again, and more perfectly, what the Postmaster-General is required by law to do.

In an effort to escape the effect of this finding of fact the relator endeavors to gloze over his fashion plates and emphasize his text. This text, he says, "is descriptive of certain inventions in the art of dressmaking." But the Postmaster-General denies this point blank. He says, on the contrary, that the "text is descriptive of certain designs or patterns for women's dresses, which patterns or designs are for sale by the publisher of said publication." (Rec., 6.) That denial and that assertion are unchallenged, uncontradicted, and unmodified. The statement of the answer is con-

clusive. But a glance at the descriptions and the plates to which they relate will show at once that the statement of the Postmaster-General is true.

Still striving to sink the dead weight of his plates in the thin stream of his text, the relator says that these fashion plates are incidental to the text, that they supplement and complete the text, that the text (like the play) is the thing, and that the plates constitute "matter supplied in order to complete that to which it is added or supplemented, but omitted from the regular issue for want of space, time, or greater convenience." Therefore, assuming the text to have an independent existence, the plates, being designed to increase the effectiveness of the text, are admissible under the provisions of the law relating to supplements. But it is a simple juggle of words to say that the plates illustrate the text or supplement and complete the text. It would be just as reasonable to say that the paintings in the Corcoran Art Gallery are designed to increase the effectiveness of the catalog and are added to complete the descriptions in its text.

The plates are precisely similar, except in the fact they represent women, to the fashion plates of men's clothes, which every merchant tailor has hanging on the walls of his shop, and shows to customers who are debating the cut of a new suit. And they are the publication. What is said of them in the answer is true:

> They are designs and instruments of trade for use by persons engaged in the business of dressmaking. That there is no true test in said publication of which said plates are illustrative or to which they are germane. * * * That the said plates are in no sense supplemental to the regular issues of such publication, but in fact constitute such issue themselves. (Rec., 6.)

The claim of the relator would make the statute in respect of supplements a palpable absurdity and would break down all the safeguards thrown around the second-class privilege. The supplement essentially presupposes a regular issue which, by reason of some emergency, is left incomplete and can be made complete only by the supplement. In other words, a supplement is a thing auxiliary, a thing appurtenant.

Another feature to be borne in mind in determining what "Wiener Chic" really is, is the loose dress pattern accompanying the loose plates. While the plates are matter of the third class, this pattern is matter of the fourth class. It is a mistake to say, as the appellant does in his brief, at page 8, that the stipulation eliminates the question of the loose patterns. While it is true that the American agent, about the time when the privilege of his publication was being investigated, discontinued the practise of inclosing such patterns to his American customers, YET THE PATTERN IS AND REMAINS AN INTEGRAL PART OF THE PUBLICATION.

It is advertised as such, and is embraced within the subscription contract; and altho, so long as the agent omits this part of the publication in mailing it to American subscribers, we can not insist that the pattern renders the whole publication chargeable at the fourth-class rate, yet the pattern is a clear indication of the true character of the publication. It is in direct support of the conclusion of the Postmaster-General, already referred to, namely, that the publication is a set of designs and instruments of trade which do not constitute a newspaper or other publication.

And here it may be remarked in conclusion that the statutes relating to periodicals obviously contemplate that each number or copy of a periodical shall be a definite and identifiable thing. This appears in every provision of the statutes. Section 12 of the act of March 3, 1879, for example, provides that if matter of the second shall be found to contain matter subject to a higher rate of postage, such matter shall be charged with postage at the rate to which the inclosed matter is subject. It makes an exception, however, in the case of the insertion in periodicals of advertisements *attached permanently* to the same.

Now, no *postal official* looking at any copy of "Wiener Chic" can tell whether it is complete or not. It is by reason of this fact that the learned counsel for the appellant is able to argue that the substantial contents inclosed within the cover,

namely, the colored plates, are a mere supplement to the pages which contain nothing but a catalog of those very plates.

And here again the characteristic form of this publication, which is really that of a portfolio, indicates that its contents are precisely what the Postmaster-General determined them to be—instruments of trade. If such a set of plates, obviously third-class matter, can be transmuted into a periodical publication by inclosing them in a cover imprinted with a serial name, number, and date, then there is practically nothing that may not be required to be transported at the second-class rate of postage.

II.

The Power to Undo Judicially what has been Done Administratively.

In enacting that a special and exceptionally low rate should be granted to "newspapers and other periodicals," it is now settled that Congress meant newspapers and periodicals in the ordinary and usual acceptation of these words. That is the basic concept of the statute. (*Payne* v. *Houghton*, 22 App. D. C., 234, 248; *Houghton* v. *Payne*, 194 U. S., 88, 196.)

But appellant's whole argument, apart from the suggestion that the publication may be admissible under section 16, as a supplement to itself, is planted precisely upon the supposed compliance

with the enumerated conditions set out in section 14:

> But while section 14 lays down certain conditions requisite to the admission of a publication as to mail matter of the second class, it does not define a periodical, or declare that upon compliance with these conditions the publication shall be deemed such. In other words, it defines certain requisites of a periodical, but does not declare that they shall be the only requisites. Under section 10 the publication must be a "periodical publication," which means, we think, that it shall not only have the feature of periodicity, but that it shall be a periodical in the ordinary meaning of the term. (*Houghton* v. *Payne*, 194 U. S., at p. 96.)

The essential thing to be borne in mind in considering not only the duty of the Postmaster-General in the premises but as well the power judicially to review the exercise of that duty is that Congress, in these statutes relating to the transportation of the mail, was not seeking by scientific definition to create a new class of objects and endow them with legal rights, but was seeking to deal in a business-like way with physical things already in existence and well recognized. As this court has remarked (*Payne* v. *Houghton*, 22 App. D. C., at p. 246), it is a matter of common knowledge that when these statutes were enacted there were in existence many long-established periodicals, generally known as magazines and reviews. The

provisions of the law therefore were not couched in technical terms having a precise legal connotation, but in simple words of common speech descriptive of common things. These things already in existence, it was seeking to classify for the purposes of handling and transporting them. It proceeded, therefore, not by definition, but by the process of simple enumeration, leaving it to the officials appointed for the purpose to apply the terms to the concrete objects. In short, Congress was, in respect of the conduct of a business institution, giving practical directions for the action of practical men. "Books," "newspapers," "periodicals," "proof sheets," "manuscript copy," "miscellaneous printed matter," "subscriber," "advertisements," "advertising purposes," "nominal rates"—all these terms, upon the application of which the second-class privilege depends, are left wholly undefined.

The application of these statutory words, the daily, yea, the hourly business of the postal service, was of necessity left to the Postmaster-General. It was left to him to determine, in each case as it arose, whether the object presented for mailing fitted the numerous terms upon which its admission was conditioned. While in the majority of cases it would be comparatively easy to determine in what category the publication fell, yet in very many others, as the Supreme Court says, it would be full of difficulties.

The application of these terms and the resolution of these difficulties is one of the main functions of the postal service; and they demand the exercise of genuine discretion, not only in view of the individual publication at stake, but also in view of the far-reaching effect which an unadvised admission, drawn into precedent, would have upon whole classes of publications. (*Houghton* v. *Payne*, 194 U. S., at p. 100.)

This is the discretion the existence of which is established by the case of *Bates* v. *Guild:*

> But we think that, although the question is largely one of law, determined by a comparison of the exhibit with the statutes, there is some discretion left in the Postmaster-General with respect to the classification of such publications as mail matter, and that the exercise of such discretion ought not to be interfered with unless the court be clearly of opinion that it was wrong. The Postmaster-General is charged with the duty of examining these publications and of determining to which class of mail matter they properly belong; and we think his decision should not be made the subject of judicial investigation in every case where one of the parties thereto is dissatisfied. (*Bates* v. *Guild*, 194 U. S., pp. 106, 107–108.)

Counsel for the appellant seems (at page 6 of his brief) to regard the declaration of the Supreme Court that its action in the Houghton case must not be construed as an intimation that every case

hereafter arising would be reviewed as a mere caution or warning and an attempt, as it were, to ward off pressure of business. This is a strange misconception. It is simply a declaration of the law and a restatement of the firmly established principle that so long as the executive officer acts within the scope of his authority his action is conclusive and not subject to judicial reversal.

New Orleans v. *Paine*, 147 U. S., 261, 264;
Seymour v. *South Carolina*, 2 App., D. C., 240, 253–256;
Gaines v. *Thompson*, 7 Wall., 347, 352, 353;
U. S. ex rel. Dunlap v. *Black*, 128 U. S., 40, 45;
Riverside Oil Co. v. *Hitchcock*, 190 U. S., p. 316, 325.

Applying the principle to the classification of mail matter, the court goes on to say:

"In such case, the decision of the Post-Office Department, rendered within the exercise of a reasonable discretion, will be treated as conclusive."

(*Bates* v. *Guild*, 194 U. S., p. 106, 110.)

It hardly seems worth while, in the face of this declaration, to consider further the broad contention of appellant that the duty of the Postmaster-General in the classification of periodicals is void of any element of discretion and is wholly ministerial, and an attentive perusal of his brief fails to disclose any circumstances whereby the duty becomes ministerial in this particular instance. We

look in vain for any indication of the simple, definite, specific, absolute, certain, and peremptory duty which alone can be ministerial.

International Contracting Co. v. *Lamont*, 155 U. S., 303, 308;
Mississippi v. *Johnson*, 4 Wall., 475, 498;
Knox County Commissions v. *Aspinwall*, 24 How., 376, 383.

The only thing which approaches an argument for the reduction of the duty in this instance to a ministerial one is the already exploded proposition that bare compliance with the enumerated requisites in section 14 is conclusive of the whole matter.

It is almost impossible to see how the court, if the decision of the Postmaster-General is to be overturned in this case, can refuse to do so in any case where the applicant felt aggrieved. That the publication is not a newspaper or other periodical in the ordinary acceptation of the terms seems to us clear and undisputable. But let us conceive it is possible that this court, sitting as Postmaster-General, might have come to a different conclusion. The question still remains (to put the case as strongly as possible for the appellant) a mixt question of fact and law. Unless the court will assume to do what the statute itself does not attempt to do and lay down a hard and fast definition of a periodical, applicable in all cases, how is it to separate this mixt question of law and fact so as to show clearly that there is a mistake of law

and in what it consists? (*Marquez* v. *Frisbie*, 101 U. S., 473, 476.)

But if this is not done a decree of reversal amounts simply to a finding that "Weiner Chic" *is* a periodical, and the net result is that you have two Postmasters-General; one in the Post-Office Department and one in this court. With this difference, however, that by statute the duty is reposed in the one in the Post-Office Department, and that it is not a judicial duty to adjudicate rates of postage.

III.

The Special Case of Foreign Periodicals.

The discretion in the Postmaster-General, established as to domestic periodicals, is even wider in respect of foreign periodicals. The reasons for this are obvious:

In the case of domestic periodicals there is an actual power and machinery to determine in a precise way the existence of the many facts upon which admission depends. Whether, for example, the publication has that *legitimate list* of subscribers, without which no publication can be admitted (and the absence of which indicates also that is intended for advertising purposes or for free circulation), can be investigated, if need be, by an inquiry into every single subscription order. The books of the publisher are likewise open to inspection for the same purposes. His whole

business is under the immediate eye of the postal service.

But, in the case of a foreign periodical, the Post-Office Department deals, as it were, in the dark. It has before it but a segment of the operations of the publication. What may be the character of the circulation as a whole (and this is, of course, the test), it is powerless to discover. What may be the practises with respect to premiums, gifts, and combination offers, except in the fraction of the circulation which is American (and this, when the publication is first admitted, may be practically nothing at all), the Post-Office Department has no means to find out. What may be the true relation of the publishing to the other business enterprises of the publisher (a fruitful means of determining whether the domestic publication is debarred as a house organ or personal advertising sheet), the Post-Office Department can only conjecture.

And so in respect of language. It is a mere accident that in the case of this publication there is an English text on the cover which is supposed to be a counterpart of the German. In most cases there stands simply one text—German, French, or Russian, as the case may be. The Post-Office Department must have special machinery to deal with that sort of thing.

Accordingly we find the statute framed, from the necessity of the case, in very broad terms:

"Foreign newspapers and other periodicals of

the same *general* character as those admitted in the United States *may, under the direction of the Postmaster-General*, be transmitted," etc.

This language was chosen with intention. And in view of the appellants' argument upon the word "may," it is well to draw the court's attention to the fact that in the act as originally drafted and reported the word was "shall," and that it was deliberately changed during its passage to "may." (Bill H. R. 3850, 45th Cong., 2d sess. See Appendix.)

It is a rule of construction that a change in phraseology indicates a change in intent. Congress would not have used different language without thereby intending a change in meaning. (*Crawford* v. *Burke*, 195 U. S., 176, 190.)

IV.

"Weiner Chic" is Primarily a House Organ.

There can be little doubt that "Weiner Chic" is primarily designed for advertising purposes in that it is designed to advertise the other business of the publisher, namely, the manufacture and sale of patterns for women's dresses. The main object of the publication is to induce dressmakers to order from the publisher patterns of the dresses therein described, all of which are for sale by him. (See Rec., 7, and translation in Appendix III.) In short, it is what has been known for a generation in postal business and the publishing world as a "house organ."

Altho this point was not determined at the hearing at the Post-Office Department because the finding that the publication is not a newspaper or periodical rendered it superfluous, it is nevertheless put in issue by the petition for mandamus and is concluded by the petitioners' applying for a peremptory writ upon the coming in of respondent's answer. (*People* v. *Commissioners of Highways*, 7 Wend., 474, 476.)

Upon whatever ground the Department may have acted, if the publication is in fact so primarily designed, it has no right under the statutes to secondclass privileges. And the relator can not demand the writ unless he make out "a clear and indisputable" right to the relief prayed. It is the force of the statute and not the Post-Office Department which debars publications from the second class, and altho the Department may have erred in placing the rejection upon one rather than upon another provision of the statute, yet if the publication be obnoxious to any provision of it, and so within its prohibition, it can not be lawfully carried as secondclass matter and it becomes immaterial whether the precise theory upon which the Post-Office Department acted is sustainable or not. (*Public Clearing House* v. *Coyne*, 194 U. S., 497, 516.)

It is respectfully submitted that the judgment appealed from should be affirmed.

HENRY H. GLASSIE,
Special Assistant to the Attorney-General.

APPENDIX I.

Existing Statutes.

SEC. 15. Foreign newspapers and other periodicals of the same general character as those admitted to the second class in the United States may, under the direction of the Postmaster-General, on application of the publishers thereof or their agents, be transmitted through the mails at the same rates as if published in the United States. Nothing in this act shall be so construed as to allow the transmission through the mails of any publication which violates any copyright granted by the United States. (1879, Mar. 3, ch. 180, sec. 15, 1 Supp., 247.)

BILL AS FIRST REPORTED.

SEC. 10. That foreign newspapers and other periodicals of the same general character as those registered in the United States *shall* be registered under the direction of the Postmaster-General, on application of the publishers thereof or their agents, and when so registered, and not otherwise, may be transmitted through the mails at the same rates as if published in the United States. (Bills H. R., 2d sess., 45 Cong., No. 3850.)

SUPPLEMENTS.

SEC. 16. Publishers of matter of the second class may, without subjecting it to extra postage, fold within their regular issues a supplement; but in all cases the added matter must be germane to the

publication which it supplements, that is to say, matter supplied in order to complete that to which it is added or supplemented, but omitted from the regular issue for want of space, time, or greater convenience, which supplement must in every case be issued with the publication. (1879, Mar. 3, ch. 180, sec: 16, 1 Supp., 247.)

APPENDIX II.

[Translation.]

CUT PATTERNS.

Cut patterns, of full size and guaranteed good fit, of all models published in our Fashion Journal and also of special orders, are furnished at the reduced prices noted below:

	K.	Mk.
Sleeves	1.00	1.00
Waists, blouses, skirts (plain and draped), and jackets	2.00	1.70
Rain cloaks, princess dresses, and négligés, walking and traveling costumes	3.00	2.50
Ball, reception, and riding costumes	4.00	3.50

The patterns are cut normal size, that is to say:

	Centimeters.
Bust measure	96
Waist measure	64
Hip measure	106

Cut patterns furnished on other special measurements cost 1 krone (gown) additional.

The cut patterns are made of good paper and have the necessary directions.

Amount due for cut paper patterns is payable in advance. If the sum is not remitted they are sent c. o. d., with an additional charge of 60 heller for postage.

Orders are filled immediately.

APPENDIX III.

CONTENTS AND COST OF SUBSCRIPTION.

Edition I:

Each number contains—

8 water-color plates.
1 large water-color plate.
12 pages with text and illustrations.
1 cut paper pattern.
1 original design.

	Kr.	Mk.	Frs.
Whole year	36.00	30.00	45.00
Half year	19.00	15.75	23.00
Quarter	10.00	8.25	12.00
Single number	3.50	3.00	4.50

Edition II:

Each number contains—

4 water-color plates.
1 large water-color plate.
12 pages with text and illustrations.
1 cut paper pattern.

	Kr.	Mk.	Frs.
Whole year	25.20	21.00	32.00
Half year	13.60	11.00	17.00
Quarter	7.20	6.00	9.00
Single number	3.00	2.50	3.50

Edition III:

Each number contains—

4 water-color plates.
12 pages with text and illustrations.
1 cut paper pattern.

	Kr.	Mk.	Frs.
Whole year	20.00	17.00	26.00
Half year	11.00	9.00	15.00
Single number	2.50	2.00	3.00

All annual subscribers to "Wiener Chic," without distinction, will receive each year, gratis, three superb "Season Albums."

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IN THE

Court of Appeals, District of Columbia

THE UNITED STATES, Ex Rel., SIGMUND REINACH, Agent, Etc., Appellant,

vs.

GEORGE B. CORTELYOU, Postmaster-General of the United States.

No. 1,708

Reply Brief for Appellant

LORENZO A. BAILEY,
IVAN HEIDEMAN,
Attorneys for Appellant.

SAXTON PRINTING CO., WASHINGTON

In the Court of Appeals of the District of Columbia.

THE UNITED STATES, EX REL. SIGMUND REINACH, AGENT, ETC., APPELLANT,

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1. At page 2, of brief for appellee, is a statement obviously intended to impress upon the court that the appellant had previously failed to accomplish by injunction what he now seeks by mandamus. As no basis for such a statement appears in the record, counsel for the appellant leaves it with the court either to ignore it or else to accept it as true and coupled with the following statement, viz: That in denying the interlocutory injunction the judge stated in effect that he did so because the Post-

master-General in excluding Wiener Chic from the second class may have had other evidence before him than that which was before the court; but the judge added upon inspection of the publication itself, that he did not intend to say that he would have reached the same conclusion as the Postmaster-General, and he clearly intimated that the publication itself appeared to him to be second-class matter. The voluntary abandonment of the equity suit and the institution of this suit was due to those statements of the judge and to the code provision (Sec. 1,275) requiring the defendant in a mandamus suit to set up in his answer all the defenses upon which he intends to rely.

2. At page 2, of brief for appellee, is a statement that in the court below the hearing was "without evidence or proofs." This is incorrect and should be amended to read, "without other evidence or proofs."

The stipulation by its terms (R. 15, 16) made the copy of the publication itself (Exhibit 1) the controlling proof in the case.

The contention that those facts stated in the petition but not admitted by the answer "are immaterial" is unfounded and unreasonable. Issue was joined on those facts and in respect thereof the petition, duly verified, could be considered as an affidavit in opposition to the answer.

The cause was "heard upon the petition, answer, exhibits and stipulations" (R. 16).

3. At page 2 and 3 of the appellee's brief this suit is erroneously designated as a "collateral" attack upon the so-called "finding and determination" of the appellee, for which he claims the same conclusiveness as if it were the judgment of a court.

The true question in this case is not as stated by the appellee, but is whether or not Wiener Chic is second-class mail matter. If so, the appellee is depriving the

relator of his statutory right and forcing him to pay eight times as much as the statute requires for postage thereon.

The contention in the "argument" for the appellee is an effort on the part of the executive department to absorb and assert judicial power. Any act of Congress attempting expressly to confer such power on the executive department would be promptly nullified by the courts as unconstitutional. To go beyond the limits indicated in appellant's brief, at page 6, would be a dangerous concession by the judiciary, whose duty it has ever been under the constitution to preserve the lines of demarcation between the legislative, the executive, and the judicial powers.

At the outset, in 1791, the judges of the circuit courts refused to enforce an Act of Congress in so far as it sought to impose upon them other than judicial duties. They held the act to be unconstitutional.

> Hayburn's case, 2 Dall., 409.
>
> U. S. *vs.* Todd, in note by Taney, C. J., 13 How., 52.

Concerning the power of the courts to review the acts of the head of an executive department, the rule is clearly stated in Marbury *vs.* Madison, 1 Cranch, 137, as follows:

> "The conclusion from this reasoning is that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty it seems equally clear that the individual who considers himself injured has

> a right to resort to the laws of his country for a remedy" (p. 166).

Further on in that opinion Chief Justice Marshall, having the delicacy as well as the importance of the question in mind, again stated the rule, to the same effect, as follows:

> "Where the head of a department acts in a case in which executive discretion is to be exercised, in which he is the mere organ of executive will, it is again repeated, that any application to a court to control, in any respect, his conduct would be rejected without hesitation. But where he is directed by law to do a certain act affecting the absolute rights of individual, in the performance of which he is not placed under the particular direction of the President, and the performance of which the President cannot lawfully forbid, and therefore is never presumed to have forbidden; as for example, to record a commission, or a patent for land, which has received all the legal solemnities; or to give a copy of such record; in such cases it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department" (pp. 170, 171).

To the example above-mentioned by Chief Justice Marshall, of cases in which an individual may have redress in the courts, we may properly add the admission to the mails of mailable matter in accordance with its statutory classification. In what respect does such an act require any greater discretion than in the ascertainment of whether

or not a commission or a patent for land which is sought to be recorded has "received all the legal solemnities?"

4. The appellee in his brief (p. 3) says, "The relator claims that Wiener Chic is a newspaper or other periodical publication." The purpose of this erroneous inclusion of the word "newspaper" is manifestly to enlarge the field for the defendant's denials and for the rhetoric of his counsel, and thus divert attention from the true issue, which is whether or not Wiener Chic is a *publication* complying with the condition as to periodicity and other conditions specified in Sec. 14 of the Act of 1879. His assertion (pp. 3, 4) that it is printed, issued and published "weeks in advance of the supposed dates of issue in the United States" is wholly irrelevant as to a publication which does not claim or purport to be a "newspaper." There is nothing in the facts so asserted to impair its title to the mail classification sought for it. The matter contained therein is necessarily prepared in advance so that the publication can be issued seasonably and thereby enable subscribers to learn in advance what will be the fashion in the near future.

5. It is true, as stated by the appellee (p. 5), that there is no denial of his assertion that the publisher has for sale designs for dresses described in the text, but the assertion itself is wholly irrelevant. It has no bearing on the case unless it be in reference to an objection that the publication is "designed primarily for advertising purposes," but no such objection is made in the return by way of averment. On the contrary the return states (R. 7) that the defendant can neither admit nor deny the allegation in the petition that the publication "is not designed primarily for advertising purposes." The subsequent averment in the return (R. 7) "that further investigation tends to show" that said publication is so designed, is not such a statement as to put the matter in issue, espe-

cially as it follows an explicit statement that the appellee is unable to deny the allegation in the petition that the publication is not so designed.

Furthermore, as to his assertions that such designs are for sale by the publishers, it is to be observed that such designs, also called loose dress patterns, are not sought to be mailed with the publication itself but are sent separately. (Stipulation, R. 15, 16, Applt's. Brief 8, 9.)

6. He says (p. 5) he denies "point blank" that the text "is descriptive of certain inventions in the art of dressmaking," but that, on the contrary, the text is descriptive of the patterns or designs. Upon this denial the publication which is in evidence (see Exhibit) must speak for itself. The denial is inconsistent with the statements in the return (R. 6) "that the said publication in substance and fact contains no text" and also that the said text (the existence of which he denies) "is purely incidental and subsidiary" to the fashion plates which are sought to be mailed with the publication.

7. The statement in his brief (p. 7) that the stipulation does not eliminate the question of the loose dress patterns is answered by the stipulation itself.

The statement that the relator discontinued the practice of inclosing such patterns "about the time when the privilege of his publication was being investigated," contains an insinuation which is unfair. The date, August, 1905, was agreed upon in the stipulation (R. 15) with the distinct understanding that this point would be thereby eliminated.

8. The statement that "no postal official looking at any copy of Wiener Chic can tell whether it is complete or not" (p. 8) suggests an affirmative answer to the question (p. 5) "whether there is anything in the nature of things which enables this high judicial tribunal to do over again and more perfectly, what the Postmaster-General is re,

quired by law to do." This is caused by official astigmatism and those afflicted therewith cannot recognize second-class mail matter when they see it. Fortunately, this disorder is not infectious and persons engaged in legislative and judicial duties appear to be immune.

To the normal eye, the verbal description of each costume in Wiener Chic appears to be completed by the accompanying plate and bearing a serial number. The pages are numbered consecutively. The learned counsel for the appellee does not say whether it is too complete or too incomplete, and without his aid in this particular we can only wonder, Which? How? and How much so?

9. The case of Houghton *vs.* Payne, cited by the appellee (pp. 9–12) contains nothing which conflicts with the appellant's contentions. On the contrary he relies upon the definition of a periodical as stated in that opinion.

As to that portion of the opinion, quoted by the appellee, stating that Sec. 14 of the Act of 1879 "defines certain requisites of a periodical, but does not declare that they shall be the only requisites," it is to be observed that the word "periodical" in that section appears only in the third paragraph and the court was evidently referring to those conditions or requisites stated in that paragraph whereby a book might be distinguished from a periodical. The whole discussion in that case was as to whether the publication in question was a book or a periodical, upon which the conclusion of the court was as follows:

> "We regard publications of the Riverside Literature Series as too clearly within the denomination of books to justify us in approving a classification of them as periodicals, notwithstanding the length of time such classification obtained, and we are, therefore, of the opinion that the judgment of

the court of appeals was correct, and it is affirmed."

The statute pointed out no means of distinguishing a book from a periodical excepting only in the general terms used in Par. 3 of Sec. 14 and the court pointed out, in the language quoted by the appellee, the obvious necessity of resorting to common usage. The court did not then have before it a publication like Wiener Chic, which no one contends is a book.

In this case no aid is obtained by referring to Secs. 7 and 10 of the Act. Section 7 declares "periodical publications" to be second-class matter, which makes that a doubtful term because Sec. 17 of the same Act declares some periodicals to be third-class matter. To get at the legislative intent it is necessary and sufficient to take the statement of Sec. 14 as we find it, that "the conditions upon which a *publication*" shall be admitted to the second classs, etc. To be second-class matter it must be a *publication* complying with all the conditions stated in Sec. 14 as to periodicity and otherwise. So far as periodicity is therein required the publication must be a periodical but not necessarily a periodical in the ordinary sense of the term.

10. At page 14, of his brief, the appellee states that the contention that bare compliance with the enumerated requisites in Sec. 14 is conclusive of the whole matter, is an "exploded proposition." If he is correct in that respect, the same explosion must have destroyed also the proposition *expressio unius*, etc. We were instructed long ago that the courts will consider a statute which is plain and unambiguous, to be complete in itself without adding conditions not necessary to effect the legislative intent. It may be a shock to counsel to learn that this proposition was saved from the explosion.

11. Concerning the dissertation upon foreign periodi-

cals, in appellee's brief (pp. 15–17), it seems sufficient, in addition to what is stated in appellant's original brief, to add:

In this case the facts alleged in the petition as to the legitimate list of subscribers and other essential facts are expressly admitted by the appellee (R. 5). He merely asserts as his conclusion of fact and of law that Wiener Chic is not a periodical publication. But he admits enough to overcome those very assertions and puts the publication itself in evidence so that the court can form its own conclusions.

Counsel for the appellee fell into a strange error in stating in his brief (p. 17) that the word "shall" was used in the original draft of Sec. 15 of the Act and was "deliberately changed" to "may" during the passage of the Act. The words "shall be registered," etc., were stricken out, but the words "may be transmitted," etc., were in the original draft just as they are in the existing statute, as appears by the appendix of appellee's brief (p. 19), and these words confer a positive right upon foreign publishers and their agents which they may assert at their option; which right it is the duty of the Postmaster-General to recognize. (See appellant's original brief, pp. 10, 11).

12. Whether or not Wiener Chic is a "house organ," as contended by appellee (pp. 17, 18) can be determined by an inspection of the record which includes also the publication itself. The appellee made a full investigation and no information had been withheld from him, yet he has never even intimated that the publication was a "house organ" until he felt it necessary to grasp at every straw when, in the preparation of his brief, he had to confront squarely the cold logic of facts and recognized that he was engaged in a losing cause.

13. The Coyne case, cited in appellee's brief (p. 10) was

a fraud order case, in which the statute authorized the Postmaster-General to make the order complained of "upon evidence satisfactory to him" and the court held that he did not exceed his authority in making the order. This conclusion was based upon the finding of facts by a master. The court went into the facts, notwithstanding the extraordinary authority given him by the statute. In the opinion is this significant language:

> "Each executive department has certain public functions and duties, the performance of which is absolutely necessary to the existence of the government, but it may temporarily, at least, operate with seeming harshness upon individuals. But it is wisely indicated that the rights of the public must, in these particulars, override the rights of individuals, *provided there be reserved to them an ultimate recourse to the judiciary*" (194 U. S., 516).

14. The statement of the contents and cost of subscription in appellee's brief (p. 21) is a translation. It does not appear nor is it material whether or not the patterns and designs referred to can be mailed at Vienna with the publication itself. In this case we are concerned with what is offered at a postoffice in this country for transmission as second-class matter, and neither the patterns, nor the designs, nor the albums have been found enclosed with Wiener Chic at the time or place of mailing so as to authorize exclusion from the second-class under Sec. 12 of the Act of 1879.

Respectfully submitted,

LORENZO A. BAILEY,
IVAN HEIDEMAN,
Attorneys for Appellant.